

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION

COMPREHENSIVE HEALTH OF )  
PLANNED PARENTHOOD GREAT )  
PLAINS, et al., ) No. 16-04313-CV-C-HFS  
Plaintiffs, ) March 21, 2017  
 ) Kansas City, Missouri  
 ) CIVIL

V. )  
 )

DR. RANDALL WILLIAMS, in his official capacity as Director of Department of Health and Senior Services, et al.,

**Defendants.**

**TRANSCRIPT OF ORAL ARGUMENT**

BEFORE THE HONORABLE HOWARD F. SACHS  
SENIOR UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography  
Transcript produced by computer

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**MARCH 21, 2017**

3 THE COURT: Court is in session for argument of  
4 preliminary injunction issues in an abortion case. Actually,  
5 to say it's an abortion case is somewhat of a misnomer because  
6 the right to abortion is not at issue in this case. The case  
7 involves whether two aspects of Missouri regulatory law remains  
8 applicable, in light of a decision of the Supreme Court in a  
9 Texas case last June.

10 I understand that we will only have two principal  
11 persons who wish to argue. That is, a representative of the  
12 Planned Parenthood group and Dr. Yeomans, who is an abortion  
13 practitioner, and I understand that Ms. Cohen will be arguing  
14 on their behalf seeking a preliminary injunction here, and that  
15 Mr. Sauer, the new Solicitor for the State of Missouri, will be  
16 representing the defendants, the Attorney General -- state  
17 defendants, that is, the Attorney General of Missouri and the  
18 Executive of the Department of Health and Senior Services.

19                   We also have as defendants the prosecutors from  
20 Boone, Jackson, Greene, and Jasper County, where I'm being  
21 asked to enjoin any possible prosecutions based upon the  
22 subject matter that we're dealing with here. And my impression  
23 is that the defendant prosecutors either may not be wishing to  
24 argue or will only have brief argument. But I've reserved the  
25 afternoon, so counsel can do as they wish.

1           I did inquire through my law clerk whether those who  
2 wished to divide the principal argument can agree on time  
3 limits. And I won't hold counsel to the time that has been  
4 suggested to me. I'm prepared to hear you out.

5           So on behalf of the plaintiff seeking the  
6 preliminary injunction, I would call upon Ms. Cohen.

7           MS. COHEN: Good afternoon, Your Honor. Melissa  
8 Cohen for the plaintiffs.

9           Your Honor, the parties discussed about 45 minutes  
10 per side should be sufficient. So I'll start with about 30  
11 minutes, and I'd like to reserve about 15 minutes for rebuttal.

12           THE COURT: All right.

13           MS. COHEN: Your Honor, under the Supreme Court's  
14 recent decision in *Whole Woman's Health*, which held that  
15 Texas's ambulatory surgical center and hospital privileges  
16 restriction were unconstitutional, Missouri's similar  
17 restrictions must also be invalidated.

18           Like the Texas requirements, Missouri's ASC  
19 restriction and hospital relationship restriction do not  
20 further the state's interest in women's health, and they impose  
21 substantial obstacles on Missouri women's access to abortion.  
22 Balancing the restriction's lack of benefits against the  
23 devastating effects they have on Missouri women, it's clear  
24 that they impose an undue burden and are unconstitutional.

25           Your Honor has raised several questions that you've

1 asked the parties to address today, and I'm going to go ahead  
2 and walk through each one of those. First --

3 THE COURT: Let me interrupt you. It's true that I  
4 decided to come up with a little different practice, and I sent  
5 some questions in advance by e-mail so that counsel wouldn't be  
6 surprised by the questions.

7 I do understand that the state's principal argument  
8 that the Missouri statutory plan is different from the Texas  
9 plan would be that the -- that under the Missouri requirement  
10 of the surgical center compliance that there is a regulation  
11 authorizing the -- authorizing some exemptions that might be  
12 granted by the department, whereas that was not an issue in the  
13 Texas case. That issue of exemption is not in the statute, but  
14 is in a regulation adopted pursuant to statute.

15 I'm not too clear -- I have read most of the  
16 filings, but I'm not too clear as to how you respond to that  
17 particular issue.

18 MS. COHEN: Sure, Your Honor. So it is true that a  
19 portion of the ambulatory surgical center regulations are  
20 permitted to be waived by the Department of Health, but that  
21 waiver process is only available for certain of the physical  
22 facility requirements that abortion providers are required to  
23 meet under the ambulatory surgical center restriction.

24 There's a whole separate set of regulations under  
25 the ambulatory surgical center restriction for which there is

1 no waiver process available. And so even if plaintiffs were to  
2 engage in the waiver process as to certain of the physical  
3 facility restrictions for which it is available, they would  
4 still be unable to get a license because they cannot meet  
5 requirements for which there is no waiver process available.

6 And furthermore, Your Honor, as you noted in the  
7 Court's decision denying the state defendants' motion to  
8 dismiss, there is no reason to believe that a process of  
9 negotiation here would be fruitful and that the parties would  
10 be able to agree upon terms for a couple of reasons, Your  
11 Honor.

12 First, there's a long history here between the  
13 Planned Parenthood -- between Planned Parenthood and the  
14 Department of Health. And the Department of Health has tried  
15 at every turn to prevent these facilities from obtaining  
16 licenses, even those that have engaged in prior litigation and  
17 that have a settlement agreement in place.

18 About a year ago, the Department of Health attempted  
19 to illegally revoke the license of the Columbia Health Center,  
20 which resulted in litigation. And even just recently, Your  
21 Honor, plaintiffs in mid-January sent the department a letter,  
22 informing it that they believe that one of the health centers  
23 is now in compliance with the hospital relationship restriction  
24 and asking for the department's view on that issue, and the  
25 department has not responded in over two months.

1                   And so for those two reasons, the assistance of the  
2 waiver process does not allow these facilities to obtain  
3 abortion facility or ambulatory surgical center licenses, and  
4 so that restriction remains -- it remains that those facilities  
5 can't comply without restriction, and so it is burdening  
6 Missouri women's access to abortion.

7                   THE COURT: Now, is it true that the Kansas City  
8 facility uses only medication for abortion purposes and that  
9 there was a complete waiver by the department of the  
10 application of the surgery center requirements? I'm not  
11 entirely clear, but you probably know what I'm talking about.

12                  MS. COHEN: Yes, Your Honor. It is correct that the  
13 Kansas City facility has historically offered only medication  
14 abortion, which involves only taking pills, and the Kansas City  
15 facility seeks to reinstate only medication abortion services.

16                  The settlement agreement that resulted from the  
17 prior litigation regarding the ambulatory surgical center  
18 requirement does include an agreement that the Kansas City  
19 Health Center will not be subject to certain physical facility  
20 requirements. So, for example, they're exempted from minimum  
21 hallway width, minimum procedure room sizes, et cetera. But  
22 the settlement agreement did not remove the Kansas City  
23 facility entirely from under the ambulatory surgical center  
24 requirement, and so there are a number of requirements that do  
25 still apply to that facility, including requirements around

1 certain administrative policies, staffing, and other things  
2 like that. So they're only exempted from the physical aspects  
3 of the restriction.

4 THE COURT: All right. And, of course, we're not  
5 talking at this point about the doctor requirements about  
6 affiliation with hospitals. Go ahead. I'm interrupting you  
7 too much, perhaps.

8 MS. COHEN: That's okay. So first, Your Honor  
9 raised a question with the parties regarding the safety of  
10 abortion, and specifically you asked, even if you thought the  
11 defendants' arguments that abortion is dangerous had merit,  
12 whether you would be free to rule inconsistently with the  
13 Supreme Court in *Whole Woman's Health*, which held that abortion  
14 is extremely safe with particularly low rates of serious  
15 complications.

16 Your Honor, even if defendants' argument had merit,  
17 which it does not, the Supreme Court's holding regarding the  
18 safety of abortion does bind this Court. As Your Honor pointed  
19 out, the Supreme Court has stated in *State Oil v. Khan* that  
20 it's its prerogative alone to overrule its precedence.

21 And there's actually recent guidance from the Eighth  
22 Circuit on this very question whether a lower court is free to  
23 depart from a Supreme Court holding in the abortion context.  
24 In 2015, the Eighth Circuit affirmed a district court decision  
25 striking down a North Dakota law that prohibited abortion after

1 a fetal heartbeat could be detected or after approximately six  
2 weeks' gestation. That case is *MKB Management Corporation*, and  
3 it's reported at 795 F.3d 768.

4 The Eighth Circuit in that case noted that there was  
5 a dispute between the parties as to when viability occurred in  
6 a pregnancy, but that the Court was bound by the Supreme  
7 Court's holding that viability is the time when a fetus can  
8 survive outside the womb, and that occurs at approximately 24  
9 weeks' gestation.

10 But the court went even further, Your Honor, and  
11 stated that not only were the lower courts bound by the Supreme  
12 Court's holding, but that evidence presented by the State of  
13 North Dakota that viability occurs earlier in pregnancy could  
14 not even create a genuine dispute because it was contrary to  
15 the Supreme Court's holding.

16 Defendants in this case raise arguments, not only  
17 about whether abortion is safe, but also regarding a number of  
18 other issues that have already been decided by the Supreme  
19 Court, including whether the restrictions at issue here serve  
20 various medical benefits. But as the Eighth Circuit in *MKB*  
21 *Management* has held, those arguments cannot even create a  
22 genuine dispute, and the Supreme Court's holding in *Whole*  
23 *Woman's Health* controls.

24 Regarding the safety of abortion, I do want to  
25 quickly address the flurry of recent filings on this issue. To

1 be clear, Your Honor, even if this Court could depart from  
2 *Whole Woman's Health's* holding that abortion is safe, there  
3 would be no reason to do so because the record in this case  
4 only reinforces that holding.

5 The record shows that every reliable study,  
6 including some of the studies cited by defendants, have found  
7 that abortion is extremely safe with very low rates of  
8 complications. And the discovery that's been produced by the  
9 plaintiffs in this case regarding the rates of complications  
10 their patients experience shows that abortion in Missouri in  
11 particular is extremely safe and that complication rates in  
12 Missouri are consistent with the rates described from the  
13 literature.

14 Defendants are scraping the bottom of the barrel  
15 trying to come up with evidence to the contrary, including  
16 issuing a subpoena recently to the St. Louis Fire Department  
17 for information regarding ambulance calls to Plaintiff RHS's  
18 St. Louis Health Center. But the documents that are responsive  
19 to that subpoena, which were produced on Friday night, only  
20 reinforce that abortion is extremely safe and that plaintiffs'  
21 tracking of complications is accurate.

22 Defendants' ongoing focus on the safety of abortion  
23 is really just a distraction, which they're harping on because  
24 they cannot show that the restrictions at issue in this case  
25 benefit women's health.

1                   Next, Your Honor raised some questions regarding the  
2 ASC requirement and specifically asked for some clarification  
3 about what procedures are required to be performed in  
4 ambulatory surgical centers in Missouri.

5                   Your Honor, under Section 197.200 of the Missouri  
6 Statutes, which is the section that defines what facilities are  
7 required to be ambulatory surgical centers, a medical facility,  
8 in general, is only required to be an ASC if it is operated  
9 primarily for the purpose of performing surgery, and  
10 regulations define "primarily" to mean 51 percent of patients  
11 or 51 percent of revenue comes from surgery. That rule applies  
12 for all types of surgery. So, for example, a physician can  
13 perform colonoscopies, skin cancer surgery, cataract surgery,  
14 liposuction, other plastic surgeries, et cetera, in a doctor's  
15 office setting, so long as those procedures don't make up more  
16 than half of the physician's practice.

17                  THE COURT: Let me ask a question on that subject.  
18 I think there's a filing that -- by one of your experts saying  
19 that the handling of miscarriages and the handling of some type  
20 of exploratory procedures that occur during examination of  
21 women would be very similar in nature to what occurs during an  
22 abortion and that neither the miscarriages, nor the exploratory  
23 procedures which we refer to, I guess, as very invasive, that  
24 that would not be required to be performed in the ambulatory  
25 surgical center. Is that your understanding and is that

1 comparison significant?

2 MS. COHEN: Yes, Your Honor. That's correct that  
3 other gynecological procedures that are very similar to  
4 abortion are not required to be in an ambulatory surgical  
5 center, unless they make up more than half of the practice.

6 And Your Honor is correct that plaintiffs' medical  
7 expert, Dr. Eisenberg, explained that the management of  
8 miscarriage is almost identical to what occurs during a  
9 surgical abortion when physicians evacuate the contents of the  
10 uterus. And Your Honor -- and it is a significant comparison  
11 because Dr. Eisenberg also explains that the kinds of  
12 complications that may rarely result from either of those two  
13 kinds of procedures are identical, and yet miscarriage  
14 management and other gynecological procedures are not required  
15 to be in an ambulatory surgical center, whereas abortions -- if  
16 a physician provides even one second-trimester abortion, it's  
17 required to be in an ambulatory surgical center, and if they  
18 provide five first-trimester abortions, it's required to be in  
19 an ambulatory surgical center. So, yes, Your Honor, that is a  
20 significant comparison.

21 THE COURT: You may continue.

22 MS. COHEN: And an additional important point, Your  
23 Honor, in addition to the fact that an ASC is required for, if  
24 a practice performs five or more first-trimester abortions is  
25 that the same is true, even if the provider offers only

1 medication abortion. So even if a provider offers only  
2 abortion via pills, it's still required to be an ambulatory  
3 surgical center.

4 There's a similar -- there is similar differential  
5 treatment, Your Honor, in terms of the hospital relationship  
6 requirement, just to be clear. So in general, a physician does  
7 not have to have hospital privileges or a transfer agreement  
8 with a hospital unless the majority of the physician's practice  
9 is surgery. And, again, that rule applies to all types of  
10 surgery. So, for example, colonoscopies, skin cancer surgery,  
11 cataract surgery can all be provided by a physician without a  
12 hospital relationship.

13 And as Your Honor has just pointed out, the same is  
14 true for miscarriage management and other similar gynecological  
15 procedures. A physician is not required to have hospital  
16 privileges or a transfer agreement with a hospital, unless  
17 those procedures make up more than half of his practice. But  
18 physicians who provide even one abortion must have hospital  
19 privileges, and that's true, even if they're only providing  
20 medication abortion with pills.

21 Your Honor, as the evidence in the record shows,  
22 there's no medical basis to single out abortion in this way  
23 because, as Dr. Eisenberg has explained and as the Supreme  
24 Court has held, an ambulatory surgical center setting and a  
25 relationship with a local hospital are irrelevant to the safe

1 provision of abortion and also irrelevant to the treatment of  
2 complications when they rarely occur. And furthermore,  
3 colonoscopies, plastic surgery, liposuction and the like, which  
4 may be performed in a doctor's office setting by a physician  
5 with no hospital relationship, are less safe than abortion, as  
6 the Supreme Court explicitly recognized in *Whole Woman's  
7 Health*.

8 Given this, it's clear that these restrictions are  
9 not actually based on medical necessity, and we're asking the  
10 Court to follow *Whole Woman's Health* and hold them  
11 unconstitutional.

12 Your Honor also asked what it would mean for things  
13 like fire safety regulations if the ambulatory surgical center  
14 restriction was enjoined as to abortion providers. Medical  
15 facilities in Missouri that are not ASCs are subject to state  
16 and local building codes which build in various fire safety and  
17 life safety requirements, and, as with all buildings in the  
18 state, medical facilities need to meet these requirements in  
19 order to get a certificate of occupancy. So this is the  
20 regulatory scheme that applies to non-ASC medical facilities in  
21 which surgical procedures are performed, like doctors' offices  
22 where skin cancer surgeries, cataract surgeries are performed,  
23 and the same regulatory scheme applies to doctors' offices in  
24 which nonsurgical procedures, like chiropractic procedures and  
25 stress tests, are done.

1                   So if abortion providers were no longer subject to  
2 the ASC restriction, they would be subject to state and local  
3 building codes and the fire safety requirements contained  
4 therein, just like every other doctor's office in the state.

5                   To be clear, though, Your Honor, abortion providers  
6 would still be subject to an array of state regulatory  
7 requirements that other physicians in the state are not subject  
8 to, even if the ASC restriction were enjoined. Just to take a  
9 few examples of the kind of regulations that apply to abortion  
10 providers, there's a 72-hour waiting period for abortion in  
11 Missouri. The State of Missouri prescribes specific  
12 information, including written materials that need to be  
13 provided to patients during the informed consent process for  
14 abortion. The State of Missouri requires that tissue samples  
15 from every abortion be sent to a pathologist, who has to file a  
16 report with the state Department of Health. Providers have to  
17 file an individual report with the Department of Health for  
18 each abortion they provide. And those are just a few examples.

19                   So, Your Honor, if the ASC restriction is held  
20 unconstitutional, abortion providers will still be subject to  
21 an array of regulations, some that other physicians in the  
22 state are subject to, and also a number that are specific to  
23 abortion providers.

24                   THE COURT: All right. I was wondering whether --  
25 the State of Texas said they've gotten into a lot of

1 complications over abortion facilities proceeding without  
2 adequate regulation or arguably doing things that should not be  
3 allowed, whether there are arguments about how much regulation  
4 there should be. And I am not aware of any further legal  
5 activity, any rulings that I find -- there are newspaper and  
6 radio reports out of Texas that would suggest that whatever  
7 problems I was concerned about have not arisen in that -- the  
8 story of the Waco abortion services, which apparently would  
9 require a new building because they sold the old one, that that  
10 would be -- that Planned Parenthood is advising that that  
11 facility would be probably restarted within the year and  
12 that -- and in Austin that in April that a closed facility  
13 would reopen. If that information is accurate, and it sounds  
14 so, that there are no further issues before the district judge  
15 down there that have complicated this situation there. Is that  
16 consistent with your understanding?

17 MS. COHEN: That's correct, Your Honor. So the  
18 Supreme Court decision in *Whole Woman's Health* ended that  
19 litigation. The case was not remanded to the district court or  
20 otherwise sent back for further proceeding. So following the  
21 June Supreme Court decision, Texas's ambulatory surgical center  
22 and hospital privileges laws simply don't apply.

23 Your Honor also asked the parties to address Justice  
24 Alito's comment in his *Whole Woman's Health* dissent that  
25 *Planned Parenthood v. Casey* appears to have set a bright-line

1 rule that a 150-mile driving distance is not an undue burden.

2 Your Honor, Justice Alito's reading of *Casey* is  
3 incorrect. First, I just want to point out that *Casey* did not  
4 discuss a 150-mile distance at all. In evaluating the  
5 constitutionality of Pennsylvania's informed consent  
6 requirement for abortion, the *Casey* court discussed the fact  
7 that some percentage of women would have to travel at least one  
8 hour, and up to three hours, as a result of that requirement.

9 But in any event, *Casey* did not set any bright-line  
10 rule. Instead, the court balanced the benefits of the informed  
11 consent law against its burdens. The court there found that  
12 the informed consent law did, in fact, further a state interest  
13 and so, in that context, the travel burden that it imposed was  
14 not undue.

15 THE COURT: And I think that the waiting period in  
16 Texas -- in Pennsylvania was acceptable. So it was an  
17 otherwise reasonable form of regulation, and that was not  
18 overridden by travel problems, whereas I think the issue here  
19 is that the Supreme Court has not found that the two  
20 requirements here are, in themselves, reasonable restrictions  
21 designed toward the safety of women who have gone through  
22 abortions.

23 So in balancing things, you're not balancing against  
24 a restriction that's been considered reasonable without  
25 considering that travel requirement. And it does seem to me

1 that there's a -- that this 150 miles is kind of a delusion  
2 here as a problem, particularly since apparently traveling from  
3 El Paso to, I guess it would be Las Cruces in New Mexico, a  
4 fairly short distance, was not considered to be permissible in  
5 the Texas case. I take it you agree with that comment?

6 MS. COHEN: Yeah, that's correct, Your Honor. So I  
7 think there are sort of two different issues going on here.  
8 One is just the -- what sort of travel distance is permissible,  
9 and Your Honor is correct. The key difference between the  
10 informed consent requirement that the court addressed in *Casey*  
11 and the ambulatory surgical center and privilege restrictions  
12 that the court addressed in *Whole Woman's Health* is that the  
13 *Casey* requirement furthered a state interest, and so some  
14 burden was permissible, whereas, in *Whole Woman's Health*, the  
15 restrictions were found to not further state interests, and so  
16 the burden imposed was not permissible.

17 And so, Your Honor, in this situation that we have  
18 here when there is really nothing on the benefit side of the  
19 balance, even a small burden could be undue. But in any event,  
20 the driving distances women currently face in Missouri are very  
21 long and, in fact, are longer than the 150-mile distance that  
22 Justice Alito refers to.

23 Just to take a couple examples, women in Missouri  
24 currently have to travel nearly 300 miles one way from the  
25 Joplin area to reach St. Louis and over 200 miles one way from

1 the Springfield area, when they could access abortion in their  
2 home communities, but for the restrictions.

3 Plaintiffs' expert, Dr. Henshaw, has provided  
4 testimony that these long distances prevent at least 20 to 25  
5 percent of Missouri women who would have sought an abortion  
6 from doing so. And Dr. Henshaw and plaintiffs' other expert,  
7 Dr. Katz, also explained that many women who are able to  
8 overcome these long distances to reach a provider are delayed  
9 and that that pushes their access to abortion later in  
10 pregnancy, which, as Dr. Eisenberg has explained, increases the  
11 risks of the procedure.

12 Your Honor, as to the issue of crossing state lines  
13 to reach an abortion provider, court after court has held that  
14 states cannot rely on their neighbors to protect their own  
15 citizens' constitutional rights. And as Your Honor points out,  
16 this is even true when an out-of-state provider is right across  
17 state lines. So the Fifth Circuit's --

18 THE COURT: Which is true here apparently, that  
19 Overland Park is where the abortions are -- physical facility  
20 abortions occur.

21 MS. COHEN: That's correct, Your Honor. So the  
22 situation in Kansas City is similar to the situation in El Paso  
23 and Las Cruces, New Mexico. And in *Whole Woman's Health*, the  
24 Fifth Circuit held that there was no undue burden to those  
25 women in El Paso because they could just cross state lines and

1 obtain an abortion in New Mexico. But the Supreme Court  
2 overturned that holding and specifically did not consider  
3 out-of-state providers, even though El Paso had an out-of-state  
4 provider right nearby. And so that same logic applies here to  
5 the Kansas City area. The fact that there's a provider on the  
6 Kansas side is irrelevant to the burden analysis under *Whole  
7 Woman's Health*.

8 Your Honor also asked the parties for information on  
9 the status of other cases similar to this one. We've already  
10 talked about the Texas case, but there's another case in Alaska  
11 regarding physical facility requirements for abortion that was  
12 filed the same day as this case. That case sought a  
13 preliminary injunction against Alaska's regulations that  
14 prevented second-trimester abortions from being performed  
15 outside of a hospital setting. After that case was filed, the  
16 State of Alaska indicated that it would issue new regulations  
17 that would make clear that a hospital setting is not required,  
18 and so the court proceedings are currently stayed, pending  
19 those regulations.

20 THE COURT: They gave up in Alaska?

21 MS. COHEN: Correct, Your Honor.

22 Importantly, Your Honor, no court has found  
23 differently and upheld physical facility requirements for  
24 abortions since *Whole Woman's Health*.

25 In terms of other cases regarding hospital

1      privileges requirements, requirements have been permanently  
2      enjoined in Wisconsin, Alabama, and, as of this past Friday, in  
3      Mississippi. There is also ongoing litigation in Louisiana  
4      regarding the privileges requirement, and that case is awaiting  
5      decision on the merits in the district court.

6                    THE COURT: So we're ahead of others as far as some  
7      live activity is concerned?

8                    MS. COHEN: Well, the Louisiana case is actually  
9      awaiting decision on the final merits of the case, so they're a  
10     little further along than we are here.

11                  And there's one additional case out of Arkansas  
12     challenging a requirement that physicians who provide abortion  
13     must have a contract with another physician with privileges.  
14     That requirement has been preliminarily enjoined by an Arkansas  
15     district court, and that decision is now being reviewed by the  
16     Eighth Circuit. So argument has been held before the Eighth  
17     Circuit, and that case is awaiting decision.

18                  Again, Your Honor --

19                  THE COURT: So there is a pending case before the  
20     Eighth Circuit on a preliminary injunction that is comparable  
21     to the one you're seeking here?

22                  MS. COHEN: It's a little bit different, Your Honor.  
23     In that case, the requirement is that physicians who provide  
24     abortion must have a contract with another physician to  
25     provide -- they must have a contract with another physician,

1 and the second physician must be the one to have hospital  
2 privileges. So it's a little bit different than the privileges  
3 requirement in this case where the provider themself must have  
4 the privileges. But, yes, Your Honor, many of the same issues  
5 that are present in this case are present in that case, as  
6 well.

7 THE COURT: And it's already been briefed in the  
8 circuit?

9 MS. COHEN: Correct. It was briefed and was  
10 recently argued, yes.

11 THE COURT: Could you give us the citation, if you  
12 have it? The name of the case with the number or whatever.

13 MS. COHEN: Sure, Your Honor. Your Honor, I will  
14 have that for you when I come back up for rebuttal.

15 THE COURT: All right.

16 MS. COHEN: I'm going to have to pull up the  
17 citation.

18 Finally, Your Honor, I'd like to address the proper  
19 scope of relief in this case, including addressing the prior  
20 settlement agreement that Comprehensive Health --

21 THE COURT: Let me interrupt. I did ask a question  
22 about the state's argument that there's a settlement agreement  
23 of a controversy in 2010 and that that should be a bar as to  
24 the Kansas City organization proceeding on what is considered  
25 to be related litigation. Do you have any comment on that

1 settlement agreement, the impact of the settlement agreement?

2 MS. COHEN: Yes, Your Honor. So before I reach the  
3 settlement agreement, I think it's helpful first to talk just a  
4 little bit about facial relief generally.

5 So, Your Honor, the Supreme Court in *Whole Woman's*  
6 *Health* invalidated the entire Texas ambulatory surgical center  
7 restriction as a whole, finding it facially unconstitutional,  
8 and we're asking this Court to reach the same result and  
9 facially invalidate the entire ASC restriction as to abortion  
10 providers.

11 Texas argued in the Supreme Court that facial relief  
12 was inappropriate and that the court should go piece by piece  
13 through the various ASC requirements. But the court explicitly  
14 rejected that approach, explaining that because the plaintiffs  
15 had shown that the restriction was facially invalid, that sort  
16 of piecemeal approach was not required.

17 Similarly, we're asking the Court to invalidate the  
18 entire hospital relationship restriction, including not only  
19 the various requirements for hospital privileges, but also the  
20 option contained in the ASC law of having a transfer agreement  
21 with a local hospital. For both the ambulatory surgical center  
22 and hospital relationship restriction, any lesser relief as to  
23 only parts of those restrictions would be contrary to *Whole*  
24 *Woman's Health*.

25 As to the settlement agreement, we're asking the

1 Court to find that the settlement agreement does not preclude  
2 such facial relief for Comprehensive Health. As an initial  
3 note about the scope of the settlement, the case out of which  
4 the settlement arose involved only Comprehensive Health and not  
5 the other plaintiffs in this case, and it concerned only  
6 certain aspects of the ambulatory surgical center restriction  
7 and did not involve any challenge to the hospital relationship  
8 restriction.

9                   This is why, Your Honor, the settlement was not at  
10 issue in the recent case that was before Judge Laughrey  
11 regarding the Columbia center's license. In that case, the  
12 department attempted to revoke the license, based only on the  
13 fact that the physician at the Columbia center had her hospital  
14 privileges revoked, and so the settlement agreement was just  
15 not relevant to that case. So to be clear --

16                  THE COURT: Let me interrupt. I'm not sure -- you  
17 may have said this, but it didn't ring through to me. Are you  
18 not seeking relief against the statutes that would make it  
19 criminal activity, I take it, for a doctor to perform abortion  
20 without an affiliation or affiliation within 30 miles, or  
21 something of that sort?

22                  MS. COHEN: We are, Your Honor. So the hospital  
23 relationship restriction is codified in essentially two  
24 different places. First, there's the standalone statute that  
25 requires a physician to have hospital privileges. And as Your

1 Honor points out, that statute does include criminal penalties.

2 There was also a separate provision that is  
3 contained within the ambulatory surgical center requirements  
4 that also requires either hospital privileges or a transfer  
5 agreement, and we're seeking an injunction as to both of those  
6 sets of regulations.

7 THE COURT: All right. And you've reached the  
8 argument that a preliminary injunction -- a preliminary  
9 injunction could be issued and that we needn't wait until a  
10 final ruling as to injunctive relief. I guess you covered that  
11 in the briefing.

12 MS. COHEN: That's correct, Your Honor, we've  
13 briefed that issue extensively, and, yes, plaintiffs believe  
14 that they have met their burden under the *Dataphase* factors for  
15 a preliminary injunction.

16 So going back to the settlement agreement. So to be  
17 clear, the settlement certainly does not bar plaintiffs RHS and  
18 Dr. Yeomans from being awarded full facial relief as to both  
19 restrictions in this case, and it clearly does not bar  
20 Comprehensive Health from being awarded facial relief as to the  
21 hospital relationship requirement.

22 As to the relief Comprehensive Health is entitled to  
23 for the ambulatory surgical center restriction, first, as Your  
24 Honor recognized in the decision denying the state defendants'  
25 motion to dismiss, the prior litigation from which the

1 settlement agreement resulted involved only a challenge to  
2 certain physical facility requirements, but that case did not  
3 challenge the fact that abortion providers are subject to the  
4 ASC restriction as a whole.

5 THE COURT: Now, I'm not sure that -- the original  
6 complaint may have been broader than you're suggesting, but I  
7 suppose during the course of the litigation they backed away  
8 from it.

9 MS. COHEN: Your Honor --

10 THE COURT: Or am I wrong?

11 MS. COHEN: Your Honor, the original complaint in  
12 that case was specific to only certain physical facility  
13 requirements, and I believe that the complaint has actually  
14 been attached to a filing in this case, which I can get you  
15 the --

16 THE COURT: It's on file.

17 MS. COHEN: Okay. So, Your Honor, that case did not  
18 challenge the fact that abortion providers are defined to be  
19 included in the ASC restriction in general. And because of  
20 that, Comprehensive Health is not precluded here from seeking  
21 and obtaining facial relief. They're seeking a different kind  
22 of relief in this case, and the language of the settlement  
23 agreement is not to the contrary.

24 Since the prior case did not challenge the fact that  
25 abortion providers were swept into the overall ambulatory

1 surgical center scheme, the settlement agreement only addresses  
2 what requirements the Kansas City and Columbia health centers  
3 have to meet, assuming that they're required to be licensed as  
4 ASCs. The settlement does not require that these health  
5 centers have to continue to be licensed as ASCs, even if that  
6 scheme no longer applies to abortion providers. So the  
7 agreement does not preclude facial relief from Comprehensive  
8 Health.

9                   And for the same reason, Your Honor, should the  
10 other plaintiffs in this case, RHS and Dr. Yeomans, be granted  
11 facial relief as to the ASC restriction, the settlement  
12 agreement becomes obsolete because by its own terms, the  
13 settlement sets out conditions under which the department will  
14 grant a license to these facilities. But if the ASC  
15 restriction is invalidated, then the Department of Health will  
16 no longer be in the business of issuing ASC licenses to  
17 abortion facilities at all. There would be no license to be  
18 granted, and requirements of the settlement agreement become  
19 moot.

20                   THE COURT: In a worst case situation, let's say I  
21 found the Kansas City organization was completely restricted.  
22 I suppose there's nothing that would prevent the St. Louis  
23 organization from moving to Columbia, for example. Would that  
24 be -- has that occurred to anybody?

25                   MS. COHEN: That's correct, Your Honor. And I think

1 this exact fact sort of illustrates the absurd result that we  
2 would have if the settlement agreement was held to continue to  
3 apply. The settlement agreement is specific to two specific  
4 buildings, actually, it's not even general as to the  
5 Comprehensive Health entity. So this absurd result would be  
6 the case where either RHS could come into the city or  
7 Comprehensive Health could simply move buildings. And so it  
8 would really be kind of an absurd outcome.

9                   And, Your Honor, continuing to apply the settlement  
10 agreement just would not make sense after *Whole Woman's Health*.  
11 It cannot be the case that the State of Missouri can continue  
12 to impose an unconstitutional licensing scheme on only two  
13 specific buildings in the state because of a prior settlement  
14 agreement. That would create a result in which some women in  
15 Missouri who happen to reside near these health centers would  
16 have their access to abortion burdened in an ongoing way  
17 because the history here has shown that, even with the  
18 settlement in place, these facilities have not been able to  
19 keep their licenses. They've been licensed on and off over  
20 time as a result of coming in and out of compliance with the  
21 various requirements and as a result of the Department of  
22 Health changing their definition of what's required under the  
23 settlement agreement, attempting to revoke the license, et  
24 cetera.

25                   So, Your Honor, even if the settlement agreement by

1 its own terms would still apply if the ASC restriction were  
2 struck down, which I've already explained would be contrary to  
3 the agreement's plain language, such a result would be contrary  
4 to *Whole Woman's Health*.

5 I would like to make one more point about the scope  
6 of relief, Your Honor. In the Court's decision denying  
7 Defendant Patterson's motion to dismiss, the Court raised the  
8 question whether it would be appropriate to extend a  
9 preliminary injunction to include the four prosecuting attorney  
10 defendants in this case. Your Honor, because the prosecuting  
11 attorneys have responsibility for enforcing the criminal  
12 privileges law, as well as the ambulatory surgical center law,  
13 it's necessary for them to be included in any preliminary  
14 relief.

15 THE COURT: It might be favorable to them to enjoin  
16 them so they wouldn't have people coming to them and saying,  
17 "Why aren't you prosecuting?"

18 MS. COHEN: That may be true, Your Honor. But in  
19 addition to that, if a preliminary injunction were entered only  
20 as to the state defendants, plaintiffs' physicians would still  
21 be unable to provide abortions because of the criminal  
22 privileges law. That law runs against the physicians  
23 themselves and threatens them, not only with a criminal  
24 prosecution, but also dire consequences to their medical  
25 licenses and their careers.

1                   So unlike at the conclusion of the merits of this  
2 case when the restrictions might be declared unconstitutional  
3 and so they could not be enforced by anyone, a preliminary  
4 injunction runs only against the parties who are specifically  
5 enjoined. So the physicians need the protection of a  
6 preliminary injunction against the prosecuting attorneys in  
7 order to be able to provide abortions while the preliminary  
8 injunction is in place and as the rest of this case is  
9 litigated.

10                  If Your Honor has no further questions, I'll reserve  
11 the remainder of my time.

12                  THE COURT: All right. I guess you have some time  
13 to respond, so you can step back.

14                  MS. COHEN: Thank you, Your Honor.

15                  THE COURT: Mr. Sauer?

16                  MR. SAUER: Thank you, Your Honor. May it please  
17 the Court. John Sauer appearing on behalf of the state  
18 defendants.

19                  THE COURT: Is this your first appearance in your  
20 current capacity, or have you been busy?

21                  MR. SAUER: This is my first court appearance in my  
22 new -- in my new job.

23                  THE COURT: First court appearance, that's what I  
24 mean.

25                  MR. SAUER: Yeah. I was in court, actually, a week

1 and a half ago in front of Judge Bough, and I second-chaired  
2 that and didn't present anything to the Court.

3 So, thank you, Your Honor. May it please the Court.  
4 John Sauer appearing on behalf of Defendants Hawley and  
5 Williams, the state defendants in this case.

6 Your Honor, I'd like to begin by discussing the  
7 point that plaintiffs' counsel ended with, which is the scope  
8 of relief that's being requested by the plaintiffs in this  
9 case. And I can't overemphasize how broad that scope of relief  
10 really is and how it contrasts with the nature of relief that  
11 the Supreme Court granted in the *Whole Woman's Health* case.

12 I would like to direct Your Honor's attention to  
13 Page 2314 of the Supreme Court Reporter in the *Whole Woman's*  
14 *Health* opinion. In that case, the majority opinion emphasized  
15 that the Texas statutes and regulations that have been passed  
16 in House Bill 2 were additive to a whole series of health and  
17 safety regulations that would remain on the books in Texas that  
18 allowed the state to engage in reasonable health and safety  
19 inspection and regulation of abortion clinics. And virtually  
20 everything that the Supreme Court identified in its holding in  
21 *Whole Woman's Health* is stuff that Texas, the State of Texas  
22 would still be allowed to do. It's stuff that these plaintiffs  
23 are asking this Court to enjoin.

24 So in particular, on Page 2314, the majority opinion  
25 pointed out that even though House Bill 2 would be enjoined,

1 Texas's other statutes that imposed reporting requirements on  
2 abortion facilities, quality assurance programs had to be  
3 implemented, personnel policies, environmental policies,  
4 infection control policies, disclosure requirements, patients'  
5 rights requirements, medical services requirements, safe  
6 anesthesia requirements, and, perhaps most importantly, random  
7 and unannounced annual inspections to ensure compliance with  
8 all of these state health and safety regulations.

9                   In this particular case, virtually every single one  
10 of these requirements that Texas had is implemented by the  
11 State of Missouri through the ambulatory surgical center  
12 requirement that's set forth in 197.200 and sort of has its  
13 regulatory instantiation in Chapters 60 and 70, are subject in  
14 60 and 70, Chapter 30-30 of the 19 -- 19 Code of State  
15 Regulations.

16                   So what the plaintiffs are asking the Court to do is  
17 essentially impose a regulatory blackout of health and safety  
18 regulations on all abortion providers throughout the state of  
19 Missouri. Literally if the plaintiffs receive the injunction  
20 that they're requesting, it would become legal overnight to  
21 perform an abortion anywhere in Missouri, in the back of an RV,  
22 potentially. And so it's a very broad scope of relief that's  
23 being asked, one that risks empowering sort of what plaintiffs'  
24 expert in other contexts has described as the worst providers,  
25 the shoddiest operators, not these plaintiffs, but other

1 potential abortion providers who overnight would be completely  
2 deregulated.

3 That's not what the Supreme Court did in *Whole*  
4 *Woman's Health* against Texas. In that case, the Supreme Court  
5 emphasized very strongly that they were leaving in place a  
6 whole series of preexisting Texas statutes and regulations.

7 Unfortunately, the way that the statutes are written  
8 in Missouri, the way that the regulations are written is the  
9 vast majority of those sorts of requirements, the vast majority  
10 of them are contained in Chapter 60 of those regulations, and  
11 plaintiffs are seeking a blanket injunction against the  
12 enforcement of any regulation in Chapter 60, whether or not  
13 that regulation is being announced pursuant to the ambulatory  
14 surgical center statute.

15 So there are at least three provisions in Chapter 60  
16 that implement statutes the plaintiffs haven't even challenged  
17 in this case. For example, there's a provision in Chapter 60  
18 on regulations that implements the informed consent statute,  
19 and they've only challenged a tiny piece of that that relates  
20 to the hospital privileges requirements. There's a provision  
21 in mandatory -- in Chapter 60 that enforces the mandatory  
22 reporter requirement that abortion facilities, like many other  
23 places, are a mandatory reporter of suspected child abuse.  
24 They're seeking an injunction against that regulation, even  
25 though they haven't challenged the statute. The requirement

1 that only physicians perform abortions, they haven't challenged  
2 that statute, but they're seeking injunction against the  
3 regulation that makes that enforceable by DHSS.

4 THE COURT: I know the Supreme Court did not favor  
5 severance, but isn't there some way that the way the statutes  
6 are organized that it could deal with ASC as a package?

7 MR. SAUER: Yes, Your Honor. I think there's a very  
8 natural way for the Court to carve an issue in this case, if  
9 the Court were, which I don't concede, to accept the merits  
10 arguments that the plaintiffs are making here. And that would  
11 be they're seeking an injunction against the entirety of  
12 Chapter 70. So it's 19 CSR 30-30.070, which implements the  
13 physical plan requirements for ambulatory surgical centers.  
14 They're seeking an injunction against that.

15 Then the only provision in Chapter 60 as to which  
16 they've made any evidence or argument is the one piece of  
17 Chapter 60 that contains the hospital privileges requirements.  
18 That's 30-30.060(1)(C)(4).

19 So really the only provisions of law as to which  
20 they've made any arguments that are unconstitutional within the  
21 regulatory code are Chapter 70 and that one provision of  
22 Chapter 60. The rest of Chapter 60, the vast majority of which  
23 is completely noncontroversial, contains a whole series of  
24 requirements, the sorts of requirements that the Supreme Court  
25 in *Hellerstedt* said these are still on the books in Texas, but

1 these plaintiffs are seeking an injunction against. For  
2 example, the infection control regimes in Chapter 30-30.060.  
3 That's 30-30.060(1)(B)(8) and (9), for example. The mere fact  
4 that abortion providers have to have licenses at all. The fact  
5 that DHSS has the right to conduct annual inspections to make  
6 sure what's going on in abortion facilities is safe. That's  
7 30-30.060(1)(A)(5).

8 COURT REPORTER: Could you please repeat that?

15                   And so the breadth of relief in this case that is  
16 sought is, I think, completely inappropriate. It is entirely  
17 distinct from the severance analysis that was conducted by the  
18 Supreme Court in *Hellerstedt* because the Supreme Court  
19 emphasized in *Hellerstedt* that all of these exact same kind of  
20 requirements, infection control procedures, quality assurance  
21 procedures --

22 COURT REPORTER: Could you please slow down?

23 MR. SAUER: I apologize. Infection control  
24 procedures, quality assurance procedures, the right of annual  
25 and random inspection, all of that remains on the books in

1 Texas. Here, that would not be the case if they receive the  
2 injunction that they seek.

3 So the state right off the bat submits that  
4 *Hellerstedt's* severability analysis is addressing an entirely  
5 distinguishable situation that was presented in this case and  
6 that the relief that the plaintiffs are seeking is sweepingly  
7 overbroad, statewide invalidation, not just as applies to these  
8 particular plaintiffs, but as applied to anyone who wants to  
9 provide abortions in any physical setting.

10 Now, plaintiffs' counsel alluded to the fact that  
11 there were certain requirements that would not be swept in  
12 here. Those requirements in Chapter 188 of the Revised  
13 Statutes of Missouri. But those requirements almost all  
14 implement, not the state's interests in promoting health and  
15 safety of abortion, but the state's interests in promoting its  
16 preference for fetal life. So the informed consent  
17 requirement, the 72-hour waiting period. The only thing in  
18 there of plaintiffs' health and safety that plaintiffs' counsel  
19 went into was the requirement of submitting tissue samples to  
20 the pathologist.

21 But the vast majority of what DHSS does to ensure  
22 that abortions are provided safely to women throughout Missouri  
23 would become illegal immediately if the Court -- if the  
24 plaintiffs receive the injunction they've asked for.

25 I'd like to move on from there, Your Honor, to

1 discuss two other, I think, critical ways in which the  
2 *Hellerstedt* decision is distinguishable from this particular  
3 case.

4 One of them is this addresses what I take it was one  
5 of Your Honor's principal questions about whether or not the  
6 State of Missouri is, in a sense, collaterally estopped from  
7 disputing the generalized sort of safety of abortion procedures  
8 by the Supreme Court's decision in *Hellerstedt*.

9 I would point the Court to the fact that the  
10 *Hellerstedt* opinion referred over 25 times to the record  
11 evidence that was submitted in the Texas case. So the holding  
12 of *Hellerstedt* is that they announce certain principles of law,  
13 the legal standard under which the undue burden analysis should  
14 be conducted, and then apply that to the district court's  
15 factual findings based on the record evidence in that  
16 particular case. I don't see anything in the *Hellerstedt*  
17 opinion that suggests that the State of Missouri is somehow  
18 bound by the factual record created by the State of Texas that  
19 focused on -- the State of Texas did not focus on abortion as  
20 it's provided in Missouri. I do not think that *Hellerstedt*  
21 somehow means that Missouri is completely bound by factual  
22 determinations that were made in that case.

23 And I would point out to Your Honor that the record  
24 evidence in this particular case is very different from the  
25 record evidence that was presented in the Texas case. It does

1 require a *Hellerstedt* analysis under the undue burden,  
2 considering the evidence that's actually been presented to the  
3 Court in this case.

4                   THE COURT: I don't remember any citations that  
5 you've given about the court's narrowing of the broad  
6 statements of the holding in a case to the particular facts  
7 that have been presented and saying, well, since we don't have  
8 those facts, we start from the beginning. I don't remember any  
9 citations on that.

10                  MR. SAUER: Your Honor, I think the Court maybe  
11 sent -- that's one of the e-mails you sent to counsel earlier  
12 before the questions relating to oral argument saying that  
13 *Hellerstedt* certainly provides substantial guidance as to how  
14 this evidence should be considered and weighed, with the notion  
15 that *Hellerstedt* has prevented any litigant from presenting new  
16 factual evidence that relates to the safety of abortion  
17 procedures, particularly in a totally different state where we  
18 have specific evidence about the way abortion is being  
19 administered in the state of Missouri that was completely  
20 absent from the record in *Hellerstedt* is, I believe would --

21                  THE COURT: But is there any -- is there any  
22 precedent that I can follow on that?

23                  MR. SAUER: Your Honor, I'll actually point the  
24 Court to *Hellerstedt* itself, and I think there's a critical  
25 point in the *Hellerstedt* opinion where the Supreme Court uses

1 the phrase that Texas's -- Texas failed to submit any expert  
2 evidence to rebut the plaintiffs' evidence, and the majority  
3 opinion drops a footnote, and it's Footnote 4, that points out  
4 that in the district court opinion in *Hellerstedt*, there was a  
5 systematic finding that the experts that the State of Texas  
6 relied on lacked credibility because they allowed some, I  
7 guess, litigation consultant actually who was a non-expert to  
8 exercise editorial control. So even the expert evidence in the  
9 *Hellerstedt* case is particularly one-sided.

10 Now, as for a case outside of -- and that one side  
11 is not present in this case at this time, nor need it ever be.

12 In addition to a case outside of *Hellerstedt*, I  
13 would direct the Court's attention to the case that you  
14 yourself cited when you submitted this query to counsel, which  
15 is you cited Justice O'Connor's separate opinion in *Roper*  
16 against *Simmons*. In *Roper*, the Supreme Court had held 16 years  
17 prior that it was constitutional, it was consistent with the  
18 Eighth Amendment, to impose the death penalty on a offender who  
19 was a juvenile at the time of capital murder. Subsequent to  
20 that, the Missouri Supreme Court in this state held about, I  
21 guess, about 16 years later, that the facts have changed. That  
22 was the holding in Supreme Court 16 years earlier, but the  
23 facts have changed and, you know, mores, societal mores have  
24 developed towards a consensus against juvenile capital  
25 punishment.

1                   And the Supreme Court affirmed without criticizing  
2 the Missouri Supreme Court, right? The opinion you cited,  
3 Justice O'Connor's opinion, was a dissent. Justice O'Connor  
4 said, I think this is inappropriate what the majority of the  
5 Supreme Court is doing in this particular case, which is  
6 allowing the Missouri Supreme Court to reassess the legal  
7 principles that were announced in the prior decision based on  
8 the submission of fresh evidence.

9                   So to the extent that there's a case on point, I  
10 would say -- I would submit that it's the case that you  
11 yourself had cited to counsel, *Roper against Simmons*.

12                  THE COURT: But I guess, though, Justice O'Connor  
13 say that the lower court, in this case, I guess, the Missouri  
14 Supreme Court, did it the wrong way, so you're asking me to do  
15 it the wrong way.

16                  MR. SAUER: I would say, Your Honor, what I -- what  
17 I'm asking you to do is apply the legal principles in the Whole  
18 Woman's Health again *Hellerstedt* decision to the unique  
19 evidence that's at issue in this case, and I believe that's the  
20 only appropriate reading of *Hellerstedt*. The alternative  
21 reading would be that no state can make its own case, so to  
22 speak, to defendants' own regulations, and I don't believe  
23 that's -- again, the Supreme Court in *Hellerstedt* referred to  
24 the factual evidence in that specific record over 25 times in  
25 the majority opinion.

1           If I may just comment briefly on some of that  
2 evidence. Your Honor, I believe the evidence we submitted in  
3 this case is kind of like a Rorschach test. I'm not a  
4 specialist in this area, but health and safety issues that, to  
5 me, seem very, very concerning are dismissed by their experts  
6 as, so to speak, nothing to see here.

7           I believe the evidence in this case, Judge, shows,  
8 the way I figure it is, four layers of risks of physical  
9 complication from abortion in the state of Missouri. The  
10 nucleus of that is the actual complications, physical  
11 complications that the St. Louis plaintiff has actually  
12 produced in discovery and that it briefed in this court. And  
13 those themselves, and many ones that we've highlighted in our  
14 briefing, exceed both the rates of physical complications that  
15 were predicted by their own expert in preliminary injunction  
16 filings and, in addition to that, they exceed rates of  
17 complication on key data points the Supreme Court relied on in  
18 *Hellerstedt*.

19           I can give the Court one example. The Supreme Court  
20 in *Hellerstedt* repeatedly relied on a study showing 15  
21 instances of hospital treatment or emergency transfers to a  
22 hospital in over 54,000 abortions. The hospital treatment rate  
23 that we got from discovery from the St. Louis plaintiff in this  
24 case shows a rate of hospital treatment over three times that  
25 high. So that's concerning, as are the other data points we

1 point to in our -- in our briefing.

2 So there's that initial layer of complications they  
3 have reported in discovery are sufficiently concerning and  
4 raise a risk of complication that exceeds that that the Supreme  
5 Court discussed in *Hellerstedt*. But in addition to that,  
6 there's also the concern that there's a set of complications  
7 that may go unreported.

8 And we've alluded to -- in the briefing to the fire  
9 department Sunshine records. Late Friday we received  
10 supplemental records from the fire department. The records we  
11 produced are incomplete. As of yesterday, I requested further  
12 information from the St. Louis Fire Department, and we would  
13 just ask the Court for leave to supplement the records, and  
14 we'll share whatever supplemental we get with all counsel,  
15 obviously, in this case. And we ask leave to supplement the  
16 record to address those after the hearing when we actually get  
17 them.

18 THE COURT: Well, the case is important, and I want  
19 to get as much education as possible. I think I probably will  
20 allow both sides to file something, if they wish to, say, ten  
21 days from today, which you could put in some new material, and  
22 I would give it appropriate consideration. I think due process  
23 requires them to respond.

24 MR. SAUER: I have no objection to allowing them to  
25 respond.

1                   THE COURT: I would allow ten days to both sides.

2                   MR. SAUER: Thank you, Your Honor. And actually,  
3 there's one other thing that's relevant to this very point that  
4 I'm making that we would -- we may want to include in that  
5 supplemental filing, and that is plaintiffs' counsel has  
6 alluded to the fact there's a statute in the State of Missouri,  
7 it's Section 188.052, that requires reports to be filed by  
8 abortion providers. There's an abortion report that's filed by  
9 every abortion provider, and then there's a separate abortion  
10 complication report that's to be filed by any healthcare  
11 provider that provides follow-up healthcare after an abortion  
12 in the event of a complication or an adverse event. And these,  
13 both of these reports are to be treated strictly  
14 confidentially, to be used for statistical purposes only. In  
15 fact, the state's position is that we would seek a court order  
16 before we went to access and use those for this litigation.  
17 But the purpose of these reports is to do exactly what we're  
18 trying to do here, which is to get to the bottom of how risky a  
19 procedure this is as it's administered in Missouri.

20                   And I was notified last week that our records  
21 custodian at DHSS has conducted a diligent search, and not a  
22 single abortion complication report has been filed by either of  
23 the plaintiffs in this case in the last 15 years. If that's  
24 true, we would like a chance to verify that and file something  
25 supplemental in ten days. If that is true, it raises a grave

1 concern about un -- I would say underreporting, but really  
2 unreporting of abortion complications.

3 THE COURT: It seems to me that the question -- or  
4 the point I mentioned about contention that miscarriages would  
5 create the same kind of problems and that there are invasive  
6 examinations that women undergo that would be comparable to  
7 what they say at least in the first trimester would be a four  
8 or five-minute procedure if -- I think maybe that came in  
9 rather late. If there's something that you want to say on that  
10 again, you could include something on that subject, if you do  
11 file something in, say, ten days.

12 MR. SAUER: Thank you, Your Honor.

13 THE COURT: Friday, the 31st.

14 MR. SAUER: Thank you, Your Honor. We'll follow up  
15 on that point, as well.

16 THE COURT: I don't think there's been any comment  
17 on that subject on your side, and it would seem to be of  
18 interest.

19 MR. SAUER: Thank you, Your Honor. And I was just  
20 going to ask if there would be any sort of a page limitation or  
21 guidance on any supplemental filing. We stipulated to five  
22 pages for the previous filings at this stage.

23 THE COURT: Both sides, I would recommend as short  
24 as possible.

25 MR. SAUER: Yes, Your Honor. There have been

1 numerous filings in this case already.

2                   So in any event, Your Honor, from the state's  
3 perspective, there are, as I was saying, four layers of  
4 physical sort of complications. There's the ones that go  
5 reported, there's the ones that, for whatever reason, the  
6 abortion providers are aware of, but they go unreported or  
7 underreported. Thirdly, there's a whole universe of  
8 complications, Your Honor, that there's every reason to believe  
9 never go reported to the abortion provider, unlike colonoscopy  
10 and various other surgical procedures we're discussing today.  
11 In many places, abortion still is surrounded by social stigma,  
12 and there's a strong reason to believe -- and the experts have  
13 disputed this, but there's a strong reason to believe that --  
14 for example, in abortion studies where there are so-called laws  
15 to follow up, and there's a disproportionate representation of  
16 women who have had negative experience with their abortion  
17 provider and are reluctant to go back and relive that negative  
18 experience and, therefore, seek treatment elsewhere.

19                   And I would direct the Court's attention to the  
20 Niinimaki study from Finland. You know, our experts have  
21 relied on certain European studies based on Finnish data. In  
22 Finland -- unlike the United States-based studies that the  
23 plaintiffs' experts have relied on heavily in this case, in  
24 Finland there isn't this concern about underreporting because,  
25 due to the nature of the medical system in that case, the data

1 gatherers are not relying solely on the initial provider to get  
2 it, and those studies show a much higher rate of complication  
3 than shown in the United States-based studies.

4 THE COURT: I think there was some criticism of the  
5 studies in Finland, but I'm not anxious to -- it's overly  
6 complicated.

7 MR. SAUER: No pun intended, actually, Your Honor.  
8 And actually, Your Honor, I was going to propose that  
9 potentially in addition to these supplemental filings, it might  
10 benefit the Court if the parties with access to these various  
11 studies we've been talking about, maybe the parties could  
12 confer and stipulate to actually filing the studies themselves.  
13 I think that would be helpful to the Court, as well. That  
14 occurred to me when I was preparing for this hearing today.

15 Finally, Judge, I would point out there's a fourth  
16 layer of complications that Missouri is trying to prevent, and  
17 that's the complications that have never happened, right?  
18 Because the state has required -- has these ambulatory surgical  
19 center requirement and hospital privileges requirements in  
20 place.

21 The St. Louis facility, for example, is the -- is  
22 the one Missouri-based abortion provider where we have  
23 substantial data, and I would point out that that facility is  
24 the safest the state can make an abortion facility. It meets  
25 the requirements of the ASC requirements. It has physicians

1 with hospital privileges at BJC, an outstanding hospital  
2 very -- in very close proximity to it.

3 So one thing that the evidence does not show that  
4 the state is very legitimately concerned about is will the  
5 health and safety record get substantially worse if these  
6 restrictions are removed. And the safe -- the evidence in the  
7 St. Louis facility, given the nature of complications they have  
8 there, raises concerns about an increase in both the rate of  
9 complications and the treatment that's given to the very  
10 serious complications that are reflected in the discovery  
11 responses.

12 I want to briefly address, Your Honor, plaintiffs'  
13 argument that these two sets of requirements essentially impose  
14 no benefit to patient health and safety, and I respectfully  
15 submit that, outside of the sort of politically charged,  
16 heavily litigated context of abortion, it is routinely viewed  
17 as a benefit, a significant benefit to patient health and  
18 safety to have these kinds of moderate surgical procedures  
19 performed in an ambulatory surgical center environment and  
20 in -- and by physicians with hospital relationships or hospital  
21 privileges.

22 I would point out, for example, that -- you know,  
23 for example, Medicaid regulations require an ambulatory  
24 surgical center to have exactly the same hospital relationship  
25 that Missouri requires of its abortion providers outside of the

1 context of abortion, and that's at 42 CFR 416.41(b)(3). That  
2 requirement requires exactly the same hospital relationship for  
3 people who are doing colonoscopies at ambulatory surgical  
4 centers, people who are doing, you know, cataract surgery and  
5 so forth.

6 So there's -- outside of the contentious area of  
7 abortion, there's widespread consensus that there's at least  
8 some significant benefit to having these particular procedures  
9 and these -- or this particular physical plan and this  
10 particular hospital relationship.

11 Similarly, you know, our expert has cited a whole  
12 series of medical -- a host of sort of medical associations,  
13 all of which, you know, had signed on to ASC requirements. The  
14 plaintiffs argue principally that -- not that it's unreasonable  
15 to have colonoscopies done in ASCs, but that abortion is  
16 singled out because, you know, five first-trimester abortions  
17 per month or one second-trimester abortion triggers the ASC  
18 requirement, whereas it's a higher volume of procedures that  
19 triggers the ASC requirements in other contexts. But that  
20 requirement doesn't undermine the fact that, outside of this  
21 context, it's almost universally recognized that there are  
22 significant health benefits to these kinds of requirements.

23 Finally, Judge, I just want to briefly discuss the  
24 issue of burdens on access. I believe we submitted a  
25 compelling case. There's a dramatic difference between the

1 burdens on access -- the evidence of burdens on access in this  
2 case than were submitted to the Supreme Court -- or submitted  
3 to the Texas district court in *Hellerstedt* and then opined upon  
4 by the Supreme Court. And in particular, I would just direct  
5 the Court's attention to recent studies that came out in early  
6 2017 funded by, you know, the --

7 COURT REPORTER: I didn't hear that.

8 MR. SAUER: I would just direct the Court's  
9 attention to recent studies, the German studies that are  
10 alluded to by the expert affidavits in this case.

11 For example, here is quote from the 2014 study,  
12 which were comprehensive nationwide studies trying to find a  
13 causal relationship between closing of clinics and loss of  
14 clinic access and the abortion rate overall. In 2014, no  
15 evidence was found that the overall drop in abortion incidents  
16 was related to decrease in providers or to restrictions  
17 implemented between 2008 and 2011, a period in which there was  
18 a particular flurry of state legislative activity that resulted  
19 in a large number of clinic closings in some states. And that  
20 what the study finds is there was really no relationship  
21 between the abortion rate in those states, perhaps  
22 counterintuitively.

23 Similar finding in 2017 study, fluctuation in clinic  
24 numbers were not clearly associated with abortion rates.  
25 Rather, restriction between access -- or abortion access and

1 abortion rates is not straightforward. Both of those studies  
2 point, as our expert witness does, to the increased use of  
3 contraceptives and the decline -- steadily declining rate in  
4 number of unwanted pregnancies as the only factors that --  
5 where there's a demonstrative causal relationship in that  
6 context.

7 THE COURT: I'm not quite sure what you think  
8 happens if -- are you suggesting that people who want an  
9 abortion, feel they need an abortion are -- that the great  
10 majority, 95 percent of them are capable of going 500 miles,  
11 whatever, to get an abortion and, therefore, closing a nearby  
12 facility doesn't affect really determined people, and that  
13 almost everybody seems to be both determined and able to go  
14 wherever they find a clinic?

15 MR. SAUER: I would say, Your Honor, that is what  
16 the non-anecdotal, empirical evidence strongly indicates. It  
17 does indicate that there has been no significant impact on  
18 actual access to abortion, and this is by studies that are  
19 published by the --

20 COURT REPORTER: I'm sorry, I didn't -- published  
21 by?

22 MR. SAUER: The Guttmacher Institute.

23 THE COURT: I'm not -- are you saying it's  
24 inexplicable but that's what the numbers show?

25 MR. SAUER: That is what the numbers show. I think

1 it is explicable, Your Honor. It is explicable by, for  
2 example, the driving distances analysis that was submitted by  
3 Dr. Solansky in his first affidavit. That in truth and fact --  
4 and actually, abortion was -- in truth and fact, even before  
5 clinic closures, there's a long history of women in Missouri  
6 seeking abortions out of state.

7 So it isn't the case -- it's, in fact, a factual --  
8 it's a fiction that, as Your Honor yourself pointed out,  
9 that -- for example, women in Kansas City aren't driving to the  
10 St. Louis facility when there's an Overland Park facility  
11 across the border. Similarly, women in Joplin are not going to  
12 St. Louis, most likely they're going to Fayetteville. And Dr.  
13 Solansky pointed out that up to 46 percent of -- regardless of  
14 these restrictions, independent of them, the history is that 46  
15 percent of women in Missouri seek abortions outside of the  
16 state, and that the driving distance -- impact of the driving  
17 distances is much less than they project.

18 THE COURT: My guess is that it's central Missouri  
19 that has the greatest problem, but I don't know how you're  
20 suggesting that in human terms there's no problem there.

21 MR. SAUER: The empirical evidence suggests that  
22 there's no significant impact on the abortion rate.

23 Now, I would point out, Your Honor, that this point  
24 sort of returns to the scope-of-relief point that I made at the  
25 beginning of this presentation. In addition to seeking a

1   blanket injunction against every regulation, including  
2   infection control and the like, in Subchapter 60 of 30-30, the  
3   plaintiffs are also seeking complete statewide relief. So you  
4   see the inconsistency in their position.

5           When it comes to the undue burden analysis, they say  
6   repeatedly that the relevant population to consider is really  
7   just the women in central Missouri. For example, don't  
8   consider the half of Missouri's population that lives within  
9   easy driving distance to the St. Louis clinic. Just consider,  
10   you know, that women, for example, in Springfield and Joplin  
11   who would go down to the Springfield clinic currently have to  
12   go to Kansas City or Fayetteville or wherever. But the relief  
13   they're seeking is not so limited. The relief they're seeking  
14   is a statewide injunction facially that, for example, you  
15   couldn't apply -- it would be an undue burden to apply these  
16   kinds of restrictions to a clinic that opened down the street  
17   from the St. Louis facility. There's an inconsistency and  
18   disconnect in their position.

19           THE COURT: If statistics show it makes no  
20   difference to abortions whether there's a facility in central  
21   Missouri, it seems to me that opponents of abortions are going  
22   to great lengths to -- they must be deluded if they're raising  
23   a great fuss about, say, opening a facility where one has been  
24   closed. I'm somewhat baffled. I guess I don't understand the  
25   statistics, but if the statistics show it doesn't make any

1 difference, I suppose, as the Supreme Court did, I need to rely  
2 on common sense.

3 MR. SAUER: Your Honor, I can't speak for what  
4 motivates the opponents of abortion, but what motivates these  
5 particular regulations is promoting the health and safety of  
6 women. And I would point out that *Hellerstedt* reaffirmed what  
7 the Supreme Court said way back in *Roe v. Wade*, which is the  
8 state has an interest, not just in promoting women's health and  
9 safety, but ensuring maximum safety in the provision of  
10 abortion procedures.

11 Turning to Your Honor's point, I would point out,  
12 again, that the 2017 Jones and Jerman study pointed out that  
13 the overall national abortion rate declined by 13 -- I believe  
14 it's by 13 percent, so about 12 percent between 2011 and 2014.  
15 In that period, the number of operating clinics in Missouri  
16 fluctuated from four to one, and the overall decrease in the  
17 abortion rate in Missouri was 12 percent. So the empirical  
18 evidence shows that Missouri went from having four clinics,  
19 which is what these plaintiffs want their injunction to effect,  
20 to one clinic, and in that period, Missouri -- the abortion  
21 rate in Missouri actually declined less than national averages.  
22 It's compelling statistically.

23 I would reemphasize that the state has an interest  
24 in ensuring the maximum safety in the provision of abortion.  
25 And I would return to the point I started with, that the

1 injunction they actually seek is so overbroad, it would impose  
2 a complete regulatory blackout on the actual health and safety  
3 regulation of abortion by the Department of Health and Senior  
4 Services, and I would urge Your Honor not to grant relief.

5 THE COURT: Perhaps I ought to make a comment that  
6 you and I have been talking about some statistics that make it  
7 hard to understand what effect closing clinics would have, but  
8 there are also records, I think, from Georgia and Texas that  
9 have been interpreted as showing that has a great effect.

10 MR. SAUER: I can address those studies, if you  
11 like, Your Honor. I would just point out that, in particular  
12 in Texas, the Grossman studies from Texas -- the Grossman  
13 studies fail to control for the fact that there was already a  
14 strong downward trend in the abortion rates. They confuse  
15 correlation with causation. And the second Grossman study,  
16 which is the stronger study, in my view, the one that has --  
17 like paints the counties darker to show the decline in the  
18 abortion rate, that's a study that fails to take into account a  
19 number of factors that may have explained the abortion rate in  
20 those particular -- the decline in abortion rate in those  
21 particular counties.

22 In contrast is that the -- I'm sorry. The Jones and  
23 Jerman studies considered national trends that generalize  
24 across the country. They're not dependent on the specific  
25 Texas geography and topography and particularly huge travel

1       distances in a state the size of Texas.

2               THE COURT: You remember -- I don't suppose you  
3 remember any criticism relating to the study in Georgia, I  
4 think that's been cited as --

5               MR. SAUER: I do, Your Honor. Dr. Solansky, one of  
6 our experts, addressed that in one of his affidavits. He  
7 pointed out that the Georgia study suffers from at least two  
8 deficiencies. One is that it's dated 1976, so it's based on  
9 data that's immediately after *Roe v. Wade*. So it's looking at  
10 a population that had different access to travel, different  
11 access to listings of abortion providers, different social  
12 attitudes towards abortion. In other words, it's -- the study  
13 is so remote in time that it's potentially obsolete.

14               Secondly, he pointed out that that  
15 study categorically omitted consideration of two abortion  
16 providers in rural Georgia. So it was assuming that everyone  
17 that was getting an abortion in Georgia was doing it at --  
18 22,000 abortions was doing it at the Atlanta clinics and  
19 analyzing travel distance on that basis when, in truth and  
20 fact, 10 percent of the abortions in Georgia were being  
21 performed at rural clinics that were completely omitted from --  
22 2,200 abortions, roughly, completely omitted from consideration  
23 in that study.

24               So it's an old study. It has grave methodological  
25 weaknesses. The recent Jones and Jerman studies are far more

1       persuasive on this point. As is Dr. Solansky's statistical  
2       analysis, which points out that there's a statistical  
3       correlation. In other words, how do you predict what the  
4       abortion rate is in Missouri, how do you predict what it is  
5       nationwide. The strongest predictor is the year, which means  
6       that whatever the causes for the downward trend do not respond  
7       to fluctuations in the number of clinics.

8                   THE COURT: Do abortion records reflect what might  
9       be felt are illegal abortions, that is, completely  
10       unprofessional activity that causes abortion? Is there any way  
11       of keeping records on that?

12                  MR. SAUER: Not to my knowledge, Your Honor. None  
13       of the studies I have seen purport to provide any empirically  
14       sound data as to how much is going on in the dark, so to speak,  
15       or through what the plaintiffs' expert has described as the  
16       shoddiest operators. And, again, I would emphasize that's a  
17       strong reason not to engage in this injunction.

18                  THE COURT: I can't imagine what kind of records  
19       they have on things of that sort. But --

20                  MR. SAUER: But I would point out the *Chicago*  
21       *Tribune* study of 2011 that's cited in one of our experts'  
22       affidavits where it was found that there was significant  
23       underreporting of abortion complications, which, like in  
24       Missouri and Illinois, was required by law, that reporters  
25       discovered that almost 4,000 abortion complication reports were

1 completely missing. That is an interesting result because it  
2 corresponds with what our preliminary assessment is as to the  
3 status of reporting in the state of Missouri. Substantial  
4 underreporting, unreported abortion complications.

5 Your Honor, if you have no further questions, I'll  
6 step aside. Thank you very much, Your Honor.

7 THE COURT: And I haven't forgotten the prosecutors,  
8 if they want to say something, but go ahead.

9 MS. COHEN: Your Honor, do you want to --

10 THE COURT: No, go ahead.

11 MS. COHEN: Your Honor, I'd like to address a few  
12 points raised by Mr. Sauer, and I'll start where Mr. Sauer  
13 ended, which is on effects.

14 Your Honor, Mr. Sauer is incorrect that the  
15 empirical evidence shows that access to abortion is not  
16 affected by the loss of clinics. Defendants in this case have  
17 looked at the overall abortion rate in the state in order to  
18 argue that the loss of providers has not burdened women. But  
19 this, Your Honor, is the wrong legal analysis.

20 The Supreme Court has been clear since *Casey*, and it  
21 recently reaffirmed in *Whole Woman's Health*, that the correct  
22 group of women to look at when assessing the burden of abortion  
23 restriction is the women for whom the restriction is relevant.  
24 So, Your Honor, Dr. Solansky, the defendants' expert, talks  
25 about driving distances for all women of reproductive age in

1 the state. For women who don't seek an abortion at all and for  
2 women who happen to live near St. Louis, the restrictions are  
3 not relevant, so this is the wrong group of women. It's also  
4 the wrong group of women to look at the overall abortion rate  
5 in the state because that includes women who have easy and  
6 local access to abortion providers.

7 I think there's actually an agreement, Your Honor,  
8 between defendants' experts and plaintiffs' expert, Dr.  
9 Henshaw, that it's true that the overall number of clinics in a  
10 state does not correlate directly to the overall abortion rate  
11 in the state, and that's because a clinic may close near one  
12 that remains open, and so that does not affect women's travel  
13 distance. Some providers only provide a few abortions a year,  
14 and, if they close, it does not affect the overall rate in the  
15 state.

16 But regardless, the overall rate is simply the wrong  
17 thing to be considering. The correct thing to be considering  
18 is women who live in or near communities that would have an  
19 abortion provider, but for the restrictions. And when that  
20 correct group of women is examined, as the Supreme Court  
21 requires under *Whole Woman's Health*, it's clear that those  
22 women are significantly burdened.

23 The studies that Dr. Henshaw relies upon look at  
24 those kinds of situations where women in a particular community  
25 are affected because there's a loss of abortion access, and

1 those studies show that that situation affects them  
2 significantly.

3 So, for example, Dr. Henshaw has said that an  
4 additional driving distance of 100 miles will prevent 20 to 25  
5 percent of women who would have obtained an abortion from being  
6 able to do so.

7 THE COURT: I think there was a calculation of 7  
8 percent of the state seemed to be affected by reduction in  
9 calculation by your expert, which itself seems to be less than  
10 one can understand. But go ahead.

11 MS. COHEN: Yes, Your Honor. I think, again, the  
12 overall abortion rate in the state, all of the experts agree  
13 that that's not a great indicator and that you really need to  
14 look at the women in particular geographic areas that are  
15 affected.

16 And I just want to quickly respond to Mr. Sauer's  
17 criticisms of the studies that Dr. Henshaw relies upon. Dr.  
18 Henshaw submitted a rebuttal declaration with plaintiffs'  
19 sur-surreply that explains that those studies are, in fact,  
20 valid. The Georgia study, for example, he explains that the  
21 age of the study is irrelevant because, while some things have  
22 changed that have increased access to abortion, other things  
23 have changed that have made access to abortion more difficult.  
24 So, for example, the women who seek abortion in the U.S.  
25 currently are far more poor than women who sought abortion in

1 the 1970s, so have a far more difficult time traveling to  
2 access abortion providers.

3 So, Your Honor, the bottom line is just that the  
4 defendants are applying the wrong legal analysis here, and when  
5 the correct legal analysis is applied and the studies that Dr.  
6 Henshaw relies upon are considered, it's clear that there is a  
7 substantial burden on women.

8 And one other important point, Your Honor, is  
9 defendants are only focusing on women who are prevented  
10 altogether from accessing abortion. Those abortion rates don't  
11 tell us anything about the significant proportion of women who  
12 are delayed in accessing abortion because of the long distances  
13 that they need to travel. And, in fact, defendants have  
14 submitted no evidence at all in this case to refute that  
15 evidence that plaintiffs have submitted that shows that the  
16 distances delay women, and that causes abortion to be pushed  
17 later in pregnancy, which increases the risks of the procedure.  
18 An abortion that's pushed later in pregnancy may get pushed  
19 into the second trimester, and a woman may have delay that  
20 causes her to be past the gestational age where she could have  
21 a medication abortion and she's forced to have a physical  
22 procedure instead. And so there's a whole other set of burdens  
23 here that the defendants have just failed to address  
24 altogether.

25 Your Honor, turning to defendants' arguments

1 regarding the safety of abortion, Your Honor, the defendants  
2 are just wrong on the safety point. They keep saying over and  
3 over again that abortion in Missouri is unsafe, but the  
4 evidence just does not bear that out. The discovery produced  
5 by plaintiffs regarding the complication rates at RHS show that  
6 abortion is extremely safe there, that the rates of  
7 complications are extremely low, and that there's no factual  
8 difference here in Missouri between -- there's no factual  
9 difference here that would counsel this Court to depart from  
10 *Whole Woman's Health's* conclusions on safety in any way. The  
11 state keeps saying there's underreporting going on in the  
12 state, but there's just no evidence of that, and saying it over  
13 and over again just does not make it true.

14           Secondly, the safety point is, in a sense, a little  
15 bit beside the point because it doesn't -- defendants have to  
16 show that the restrictions at issue in this case benefit  
17 women's health, and that they have not done. They've said  
18 multiple times, and Mr. Sauer said again today, that it  
19 benefits women's health, but they've never explained how,  
20 except to reiterate some arguments that the Supreme Court has  
21 already rejected.

22           Mr. Sauer says today that there's a consensus that  
23 gynecological procedures ought to be done in ambulatory  
24 surgical centers, but that's just incorrect. In fact, the  
25 American College of Obstetrics and Gynecology, which is the

1 leading obstetrics and gynecological professional organization  
2 does not require that abortions be performed in ASCs.

3                   Abortions are very different from the other surgical  
4 procedures that Mr. Sauer addressed here today. They're not --  
5 they don't involve an incision, they don't involve any deep  
6 sedation, and many abortions are provided with just oral  
7 medication. And defendants throughout these proceedings so far  
8 have not presented any argument, either here today or in their  
9 papers, that medication abortion -- that there's any reason for  
10 medication abortion to be provided in an ambulatory surgical  
11 center.

12                  Mr. Sauer also argued that the expert evidence in  
13 *Whole Woman's Health* was one side and that's another reason why  
14 Your Honor should depart from the *Whole Woman's Health*  
15 decision. But that's incorrect. The evidence in this case  
16 shows that all the credible studies have found that abortion is  
17 very safe. Defendants' experts rely on studies that are about  
18 different things altogether or from different countries, and we  
19 know that they don't apply to the United States. But even some  
20 of the defendant -- studies that defendants cite that are  
21 actually reliable, those are the very same studies that the  
22 Supreme Court relied upon when it found that abortion is, in  
23 fact, extremely safe.

24                  In addition, Your Honor, Mr. Sauer says that  
25 plaintiffs are asking for a regulatory blackout here, and that

1 could not be further from the case. First of all, as I've  
2 already discussed today, abortion is incredibly closely  
3 regulated in Missouri, and plaintiffs here only challenge the  
4 ambulatory surgical center and hospital relationship  
5 restrictions. Mr. Sauer talked about a number of other  
6 restrictions that plaintiffs don't challenge and that will  
7 remain in place. The requirement that only physicians may  
8 provide abortions in Missouri, the various reporting  
9 requirements, mandatory reporting around minors, that's all  
10 remaining in place, and plaintiffs are not challenging those  
11 requirements.

12 In terms of requirements in Texas, so in Texas,  
13 there were some underlying regulatory schemes in place before  
14 the state passed the ambulatory surgical center requirement.  
15 Mr. Sauer is correct that those regulations do remain in place  
16 in Texas, but that's because they were not challenged in *Whole  
17 Woman's Health*, and the court had no occasion to comment on  
18 whether or not they have any benefit.

19 Plaintiffs here are not arguing that Missouri should  
20 not be able to regulate abortion. The state is free to pass a  
21 constitutional regulatory scheme; however, it's clear under  
22 *Whole Woman's Health* that the ambulatory surgical center  
23 restriction is unconstitutional and that they cannot regulate  
24 abortion in that way.

25 Just a couple of housekeeping matters, if Your Honor

1 doesn't have any further questions. I want to go ahead and  
2 provide that citation to the Arkansas case that's currently  
3 before the Eighth Circuit that is reviewing -- is addressing  
4 some similar issues. That case is *Planned Parenthood v.*  
5 *Jegley*, and the case number in the Eighth Circuit is 16-2234.  
6 The district court decision in that case that preliminarily  
7 enjoined the statute at issue is reported at 2016 WL 6211310.

8 THE COURT: To the extent I'm not making notes, it's  
9 because it's all supposedly written down here, and I'll be able  
10 to look at it later.

11 MS. COHEN: Yes, I'm with you, Your Honor. So, Your  
12 Honor, in conclusion, the current law in Missouri, the  
13 ambulatory surgical center requirement and the hospital  
14 privileges requirement, significantly burden access to abortion  
15 with zero medical benefit and, under *Whole Woman's Health*, they  
16 simply cannot stand. Thank you.

17 THE COURT: Thank you. And I guess you traveled  
18 further than anyone, so I thank you for that.

19 Do any of the attorneys for the prosecutors wish to  
20 be heard?

21 MR. MYERS: Todd Myers for Defendant Patterson. I  
22 don't wish to be heard, Your Honor.

23 MR. ROUSE: Norman Rouse for Theresa Kenney. I  
24 don't need to be heard. Thank you, Your Honor.

25 MR. WILLINGHAM: Travis Willingham for Jean Peters

1 Baker, and I think I had the shortest amount of travel for  
2 this. I have nothing.

3 THE COURT: All right. I will take the preliminary  
4 injunction issue under advisement, and I have advised counsel I  
5 would consider any filing by Friday the 31st, and I'm not  
6 urging that there be anything substantial filed. I would  
7 repeat that I would hope that you keep it as short and simple  
8 as possible because, if not, why, we'll be getting into more  
9 issues of wanting to respond. But I will take this under  
10 advisement at this time.

11 (Hearing adjourned.)

12 - - -

13 - - -

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

17

18

19 March 22, 2017

20 /s/ \_\_\_\_\_  
21 Kathleen M. Wirt, RDR, CRR  
22 U.S. Court Reporter

23

24

25